Labor News & Views

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INAUGURAL ISSUE

This is the inaugural issue of the Labor News & Views newsletter. This newsletter is brought to you by the Appeals and Investigations Division (Code 40) of the Human Resources Services Center – NW (HRSC-NW) (see the "Appeals and Investigations" article on page 2).

The purpose of the newsletter is to enhance customer service and to provide you with information on a variety of employee and labor relations issues and related concerns in a fashion you can use.

This newsletter will be published bi-monthly. We welcome any of your comments and encourage you to email us with ideas to:
nwlabor_nw@nw.hroc.navy.mil.

INSIDE THIS ISSUE

4

QUIZ TIME

In which of the following situations are you obligated by law to invite a union representative to attend the meeting between you and your employee, Dave?

(1) You are going to counsel Dave about his sick leave usage. He does not request a representative.

(2) You are going to investigate a report that Dave was sleeping while on duty. Dave requests a representative.

(3) You are going to counsel Dave about his poor work performance. Dave requests a representative.

(4) You are going to counsel Dave about his sick leave usage. He requests a representative.

(5) Dave requests a meeting with you and the representative to discuss a change in his work schedule.

(6) You are going to investigate a report that Dave was sleeping while on duty. Dave does not request a representative.

(7) A position classifier is going to conduct a classification audit of Dave's job. Dave requests a representative.

(8) You are going to counsel Dave about his poor work performance. Dave does not request a representative.

APPEALS AND INVESTIGATIONS? WHAT'S THAT?

The HRSC-NW stood up in September of 1997. It has many responsibilities, but the office that brings you this newsletter is the Appeals and Investigations Department. This department is headed by William Kalin, formerly from Subase. Other individuals assigned to the department are Bobby McGee (formerly from PSNS), Norman Hill (formerly from Subase), Tammy Johnson (formerly from PSNS), and Steve Leuthold (formerly from the Air National Guard in Reno).

What do they do? This department is responsible for Congressional inquiry responses, representing DoN at third party proceedings such as unfair labor practice charges and Impasse hearings. They also provide guidance and information on ER/LR matters such as collective bargaining, impasse proceedings, discipline and appeal processes.

WEINGARTEN

WHAT IS IT?

5 U.S.C. 7114(a)(2) provides, in part:

"An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –

(A) …; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if –

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

This provision in the law is commonly referred to as the "Weingarten" provision. Some may try to be funny and say it's the "Whine"garten provision but whatever you call it, it stems from private sector case law, Weingarten v. NLRB. The Weingarten Corporation fired an employee for misconduct. Upon appeal to the courts, the judge ordered the employee rehired because in the course of conducting its investigation, Weingarten's agent failed to honor the employee's request for a union steward to be present during questioning.

There are several key words and phrases in this provision of law. All must be met before you have an obligation to invite a representative:

"*Examination .. in connection with an investigation*." Ask yourself: Am I investigating something and asking the employee questions? Counseling an employee regarding attendance or performance deficiencies does not constitute an examination and therefore does not trigger this provision. Thus you have no obligation to obtain a union representative in situations (1), (3), (4), (7), or (8).

"... Reasonably believes the examination may result in disciplinary action, etc." An examination in which a "reasonable person" would not have reason to believe that discipline would follow, for example questions by a position classifier in the course of conducting a classification audit, would not trigger this provision. Thus you have no obligation to obtain representation in situation (7).

Employee requests representation. Without a request from the employee, you have no obligation to obtain representation even if you are conducting an "examination ... in connection with an investigation."

Further, management has no obligation to advise employees of the right to request representation in any situation. Activities are required to advise employees annually of this right. It is incumbent

upon the employee to request such representation and should they not do so, management has no obligation to arrange representation on their behalf. Thus you have no obligation in situation (6).

All, not just some, of the above criteria must be met to trigger your obligation under the law. Applying the above criteria to the quiz on page 1 reveals only in situation (2) are you obligated to honor Dave's request for representation. This is not to suggest that you might not find it beneficial to honor Dave's request in those other situations, only that you have no obligation by law to do so. A word of caution, however, is not to delay the investigation should you have a time sensitive issue (For example, you are investigating an accident that occurred at the worksite). While you may want to be cooperative you should not create an unreasonable delay in investigating work-related matters.

"I Want A Steward!"

When you do find yourself in a situation which meets all the criteria of Weingarten, you have several options. Let's say you are in situation 2 of our quiz. What can you do?

You have the following alternatives available:

1. You may arrange to obtain representation before continuing the meeting;

2. You may discontinue the meeting; OR

3. You may give the employee the choice of continuing the meeting without representation or facing the possibility of you deciding the discipline issue without benefit of hearing the employee's side of the story.

The law does not guarantee an employee representation. The law provides a right to the union, not to the employee. If the union, after being given the opportunity to be represented at such meetings elects not to attend, you may continue the meeting with the employee without representation.

A word of caution concerning situation (5) of our quiz. You do not have an obligation to obtain representation in this situation because you do not have a legal obligation to honor the employee's request for a meeting. In some situations, you might want to honor his request. In other situations you might offer to meet with the employee without the representative. But in certain situations, if you agree to meet with the employee you have an obligation to afford the union the opportunity to be present.

Is It Formal?

There is another provision in the law that requires the union to be given the opportunity to be represented at "formal meetings," whether or not the employee requests their presence. Stay tune to our next newsletter where we'll talk about this subject.

Douglas Factors

In Douglas v. Veteran's Administration, a decision issued in 1981, the Merit Systems Protection Board (we call it the Board) carefully outlined many of the factors that agencies should consider in selecting an appropriate penalty in serious disciplinary offenses. In this particular case, Mr. Douglas and several other appellants had admitted that they were guilty of at least one, if not all, of the charges of misconduct specified by their agencies. But they appealed to the Board that the penalties selected by the agencies were too severe.

First, the Board determined that it did have the authority to mitigate (reduce) penalties when an Agency's action is determined to be arbitrary, capricious, or an abuse of discretion. After listening to the penalties, the Board then laid out several factors that are to be considered when

determining an appropriate penalty. These factors (which are often referred to as the "Douglas Factors") are:

1. the nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain or was often repeated;

2. the employee's job level and type of employment, including supervisory or fiduciary role, contact with the public and prominence of position;

3. the employee's past disciplinary record;

4. the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5. the effect of the offense upon the employee's ability to perform at a satisfactory level;

6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. consistency of the penalty with any applicable agency table of penalties (Editors Comment: Navy has its own table of penalties);

8. the notoriety of the offense or its impact on the reputation of the agency;

9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. potential for employee's rehabilitation;

11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

In the cases of all but two of the Douglas appellants, the Board found that the agencies had properly considered the relevant factors, and that the penalties were reasonable. Therefore the agency's actions were affirmed. In the other two cases, the Board mitigated the penalty in one, and remanded the other back to the Administrative Judge to obtain additional evidence.

The Board, in subsequent decisions, has made it clear that the agency need not consider *every* one of the twelve factors in each case, only those factors which are relevant. In addition, there may be issues that are not described in the Douglas factors which may be relevant and also should be included in the agency's analysis and decision. The Board has also held it will not reduce a penalty because the agency has not expressed every factor considered in enforcing the penalty as long as the penalty is reasonable with regard to the offense committed.

TRAINING OPPORTUNITIES

Date	Class	Location
4/27-28	Leadership Skills in the 21st Century	HRSC
5/2-3	Conflict Mgmt & Resolution Skills	HRSC
5/3-5	Labor Relations for Supv & Mgrs	HRSC
6/20-21	Supervisor's Conference	Silverdale Hotel
If interested, contact Code 30 at HRSC at 315-8143		